A

FADHIL HUSSEIIN ISHAK YASSIN MANSOR v. PUBLIC ISLAMIC BANK BHD & ANOR

COURT OF APPEAL, PUTRAJAYA
S NANTHA BALAN JCA
MOHD NAZLAN GHAZALI JCA
B CHOO KAH SING JCA
[CIVIL APPEAL NO: B-03(IM)-93-10-2022]
12 AUGUST 2024

C **Abstract** – *(i) The court cannot invoke its inherent powers to extend the time for the payment of a balance purchase price, in a sale under the National Land Code, beyond the mandatory 120-day period stipulated in s. 257(1)(g), even in exceptional circumstances such as the COVID-19 pandemic; (ii) Once an application for intervention has been struck out or dismissed, the court has no power to grant any order that would benefit the proposed intervener.*

D

LAND LAW: *Sale and purchase of property – Purchase price – Payment of balance of purchase price – Successful bidder in auction signed memorandum of sale – Bidder unable to pay balance purchase price within mandatory statutorily-provided period of 120 days – Bidder sought extension of time to make payment – Whether court could invoke inherent powers to extend time for payment of balance purchase price beyond mandatory statutorily-provided period of 120 days – National Land Code, ss. 256 & 257(1)(g)*

E

F ***CIVIL PROCEDURE:*** *Courts – Inherent powers – Successful bidder in auction unable to pay balance purchase price within 120 days – Whether court could invoke inherent powers to extend time for payment of balance purchase price beyond mandatory statutorily-provided period of 120 days stipulated in s. 257(1)(g) of National Land Code – Courts of Judicature Act 1964*

G ***CIVIL PROCEDURE:*** *Intervention – Application for – Dismissal – Successful bidder in auction unable to pay balance purchase price within mandatory statutorily-provided period of 120 days – Bidder sought to intervene and for extension of time – High Court struck out/dismissed application but excluded 28 days from computation of 120 days – Indirect extension of time for payment of balance of* H *purchase price – Whether court seized with power to grant any orders that would benefit proposed intervener once application for intervention has been struck out/dismissed – Rules of Court 2012, O. 15 r. 6 & O. 92 r. 4*

WORDS & PHRASES: *'there shall be no extension of the period so specific' – Section 257(1)(g) of National Land Code – Whether mandatory – Whether court* I *could invoke inherent powers to extend time for payment of balance purchase price beyond mandatory 120-day period*

The appellant ('chargor') had charged his property as a security for the banking facility that he had taken from the first respondent ('bank'). When the chargor defaulted in his payment obligations, the bank proceeded to enforce its security and commenced proceedings pursuant to the National Land Code ('NLC') to enforce the charge. The property was auctioned with a reserve price of RM1.6 million where the second respondent ('bidder') was the successful bidder. The bidder signed the memorandum of sale ('MOS') and paid the requisite 10% deposit. The last date for the payment of the balance purchase price was 3 August 2021, *ie*, within the period of 120 days as per the requirement of s. 257(1)(g) of the NLC. The bidder was unable to pay the balance purchase price, citing the disruption of legal services, limited banking hours and the closure of the land office – all brought about by the Movement Control Order ('MCO') imposed by the Government of Malaysia, following the COVID-19 pandemic – as the reason. It was only after the expiry of the deadline that the bidder, on 6 August 2021, applied for the High Court's leave to intervene in the execution proceedings and for an extension of time of 14 days (from 3 August 2021) to complete the sale, pursuant to O. 15 r. 6 and O. 92 r. 4 of the Rules of Court 2012 ('ROC') ('encl. 73'). The Deputy Registrar ('DR'), despite striking out/dismissing encl. 73 with costs, excluded 28 days from the computation of 120 days thereby indirectly extending time for payment of the balance of the purchase price. The chargor appealed to the judge in chambers, against the decision and the order of the DR, but the appeal was dismissed by the Judicial Commissioner ('JC'). Hence, the present appeal. The issues that arose were: (i) whether the DR and the JC were correct in law in allowing a suspension of time during the total lockdown period announced by the Government and for the 28 days during the total lockdown, from 1 June 2021 till 28 June 2021, to be excluded in the computation of the 120 days, stated in s. 257(1)(g) of the NLC; and (ii) whether, after dismissing/striking out an application by an intervener, the court was seized with any power or jurisdiction to grant any orders, including but not limited to orders, which were for the benefit of the proposed unsuccessful intervener.

Held (allowing appeal; setting aside orders of High Court; granting consequential orders as per para. [69] of judgment)
Per S Nantha Balan JCA delivering the judgment of the court:

(1) The bidder sought to invoke para. 8 of the Schedule to the Courts of Judicature Act 1964 ('CJA') to justify the High Court's exemption, which was equivalent to the extension of 28 days. This was not a situation where the bidder was incapable of performing its payment obligation within 120 days. The bidder signed the MOS, knowing that it had to pay within 120 days. There were periods or windows of opportunity for it to make the said payment. The fact that the bidder had to seek financing was its own problem; it was up to the bidder to find its source of funding. The words appearing in s. 257(1)(g) of the NLC

were clear and unambiguous both as to its intent and effect and as to whether there could be any extension of time; it stated in plain language that 'there shall be no extension of time of the period so specified'. It could not be seen how the bidder could invoke para. 8 of the Schedule to the CJA. Although the DR and the JC agreed that there was no power to extend time, they nevertheless resorted to the court's 'inherent powers'; the DR and the JC were impelled by the compelling circumstances caused by the COVID-19 pandemic to assist and alleviate the bidder from the harsh consequences of the MCO. In their endeavours to do justice in favour of the bidder, the DR and the JC had acted contrary to the clear, unambiguous and imperative wording in s. 257(1)(g) of the NLC which did not permit any extension of time. Whilst the harshness of s. 257 of the NLC is acknowledged, there is no choice in the matter. The courts must not impulsively resort to 'inherent power' to do what they think is justice of the case and overcome the strictures or harshness of the said statutory provision. The duty of the court is to apply the law, no matter how harsh or unreasonable the consequences may be. The orders of the DR and the JC were set aside. (paras 40, 42, 45, 55-57, 60, 63 & 68)

(2) Once encl. 73 was struck out/dismissed, that was the end of the matter. The DR's order, *ie*, excluding 28 days from the computation of 120 days despite striking out/dismissing encl. 73 with costs, was fundamentally and procedurally defective and this defect was not capable of being cured under the ROC. (paras 18 & 66)

Case(s) referred to:

AJS v. JMH & Another Appeal [2022] 1 CLJ 331 FC ***(refd)***

AmBank (M) Bhd v. AIM Edition Sdn Bhd [2022] 1 CLJ 831 FC ***(refd)***

Datuk Bandar Kuala Lumpur v. Kuala Lumpur Golf And Country Club Bhd [2005] 3 CLJ 901 FC ***(refd)***

Ho Kean Pin v. Malayan Banking Bhd & Anor [2020] CLJU 1107; [2020] 1 LNS 1107 HC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***

Malaysia Building Society Bhd v. Merit Aim Sdn Bhd & Anor; Cameron Mall Sdn Bhd & Anor (Interveners) [2012] 4 CLJ 269 HC ***(refd)***

Perbadanan Pengurusan Anjung Hijau v. Pesuruhjaya Bangunan Dewan Bandaraya Kuala Lumpur [2018] 7 CLJ 336 HC ***(refd)***

PP v. Lam Leng Hung And Others [2018] SGCA 7 ***(refd)***

Public Islamic Bank Bhd v. Fadhil Husseiin Ishak Yassin Mansor; MS Citajaya Sdn Bhd (Proposed Intervener) [2023] 3 CLJ 102 HC ***(refd)***

Santhi Krishnan v. Malaysia Building Society Bhd [2015] 1 CLJ 1099 CA ***(refd)***

Toh Hi Taa & Anor v. Citibank Bhd [2005] CLJU 394; [2005] 1 LNS 394 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, Schedule para. 8
Local Government Act 1976, s. 145(1)
National Land Code, ss. 257(1)(g), (h), 267A, 340(2)
Rules of Court 2012, O. 15 r. 6, O. 92 r. 4
Prevention and Control of Infectious Diseases Act 1988, s. 11

For the appellant - S Shanmugam; M/s Sutha & Co
For the 1st respondent - Ahmad Zamri Asaad Khuzaimi & Kathiravan Raveenthran; M/s Che Mokhtar & Ling
For the 2nd respondent - Suhada Mohd Esa, Ismail Mohamed Ariffin & Nursuhaili Mohd Razali; M/s Azri, Lee Swee Seng & Co

[Editor's note: For the High Court judgment, please see Public Islamic Bank Berhad v. Fadhil Husseiin Ishak Yassin Mansor; MS Citajaya Sdn Bhd (Proposed Intervener) [2023] 3 CLJ 102 (overruled).]

Reported by Najib Tamby

JUDGMENT

S Nantha Balan JCA:

Introduction

[1] The appellant in this appeal is Encik Fadhil Husseiin Ishak Yassin bin Mansor (No. K/P: 610817-03-5653/6301917). For convenience, we shall refer to the appellant as "the chargor". The chargor's appeal is against the decision of the learned Judicial Commissioner dated 9 September 2022 dismissing the chargor's notice of appeal to the judge in chambers (encl. 93). The decision of the learned Judicial Commissioner is reported as *Public Islamic Bank Bhd v. Fadhil Husseiin Ishak Yassin Mansor; MS Citajaya Sdn Bhd (Proposed Intervener)* [2023] 3 CLJ 102; [2022] AMEJ 1934; [2023] 9 MLJ 272.

[2] The main question that arises for consideration in this appeal is whether, despite the wording of s. 257(1)(g) of the National Land Code, which stipulates that an order for sale shall be as per Form 16H and shall "specify that the balance of the purchase price shall be settled on a date not later than 120 days from the date of the sale and that there shall be no extension of the period so specified", a successful bidder who is not able to pay the balance of the purchase price within the 120 day time period may apply to the High Court for an extension of time to pay the balance of the purchase price by "excluding" days from the computation of the time period for the full payment of the said purchase price. Contextually, the issue here is whether due to the COVID-19 pandemic and the lockdown on account of the Movement Control Order ("MCO"), the High Court has any "inherent powers" to allow a "suspension" of time during the total lockdown period announced by the Government and therefore, the 28 days during the total

lockdown from 1 June 2021 till 28 June 2021 should be excluded in the computation of the 120 days stated in s. 257(1)(g) of the National Land Code. The next question is an adjectival one and it is – whether, upon dismissing (or striking out) an application by the proposed intervener, the court thereafter has any power or jurisdiction to grant any orders, including but not limited to orders which are for the benefit of the proposed (unsuccessful) intervener. We shall briefly state the facts giving rise to this appeal.

The Charge – Enforcement

[3] The chargor was the registered owner of property held under Geran No. Hak Milik 194223, Lot 109568, Mukim Klang, Daerah Klang, Negeri Selangor Darul Ehsan (postal address at No. 5 Jalan Kemuning Permai 33/42G, Kemuning Utama, Section 33, 40400 Shah Alam, Selangor Darul Ehsan) ("the subject property"). The chargor took a "Al-Bai Bithaman Ajil" facility from Public Bank Berhad. As security the subject property was charged to Public Bank Berhad pursuant to Bil. Perserahan No. 75746/2008 bertarikh 12 Ogos 2008 diatas tanah dipegang dibawah Geran No. Hakmilik 194223, Lot 109568, Mukim Klang, Daerah Klang, Negeri Selangor Darul Ehsan ("the charge").

[4] Pursuant to a vesting order of the High Court dated 15 July 2008, the assets, liabilities and the entire Islamic banking business of Public Bank Berhad was transferred to Public Islamic Bank Berhad ("the bank"). The chargor defaulted on his payment obligations and the bank enforced its security and commenced proceedings under the National Land Code to enforce the charge. On 20 February 2018, the High Court granted an order for sale of the subject property. Subsequently, the bank applied to the execution division of High Court Shah Alam to fix an auction date and the reserve price. The first auction date was fixed on 9 July 2018 with an initial reserve price of RM3,200,000. However, the first auction was unsuccessful. Thereafter, the bank filed several applications to fix new auction dates and reserve price for the subsequent auctions. All these attempts to sell the subject property *via* auctions were unsuccessful.

The Auction

[5] The subject property was successfully auctioned on 5 April 2021 with a reserve price of RM1,600,000. The second respondent, MS Citajaya Sdn Bhd, was the successful bidder. We shall refer to them as the bidder. The bidder signed the memorandum of sale on 5 April 2021 ("the memorandum of sale") and paid the requisite 10% deposit of RM160,000 on 5 April 2021. Condition 16 of the memorandum of sale reads relevantly as follows:

> Penawar yang berjaya hendaklah menanadatangani Memorandum Jualan dan juga hendaklah membuat pembayaran baki harga dalam tempoh seratus dua puluh (120) hari dari tarikh jualan. Kegagalan penawar yang berjaya untuk memenuhi kedua-dua syarat tersebut **akan menyebabkan jualan lelongan terbatal dan wang deposit 10% daripada harga rizab**

akan dirampas oleh Plaintiff dan digunakan untuk menjelaskan bayaran hutang Defendan kepada Plaintif setelah ditolak segala perbelanjaan lelongan tersebut.

(emphasis added)

[6] The last date for payment of the balance sum of RM1,440,000 was 3 August 2021. The bidder applied for a banking loan facility for the amount of RM965,100 including business financing term takaful (the facility) from Public Islamic Bank Berhad (Kuala Terengganu Branch), to finance the said purchase. Incidentally, this happens to be the branch of the bank (chargee). On 16 July 2021, the bidder paid the differential sum of RM480,000 to the bank's solicitors. However, the bidder was unable to pay the balance of the purchase price within the period of 120 days as per condition 16 of the memorandum of sale.

[7] Condition 16 is a mandatory requirement as per s. 257(1)(g) of the National Land Code. Section 257(1)(g) reads as follows:

Section 257

(1) Every order for sale made by the Court under Section 256 shall be in Form 16H and shall:

...

(g) specify that the balance of the purchase price shall be settled on a date **not later than one hundred and twenty days from the date of the sale and that there shall be no extension of the period so specified**; and

(emphasis added)

[8] Now, in the event a successful bidder fails to make payment of the balance of the purchase price within 120 days as per s. 257(1)(g) of the National Land Code, then pursuant to s. 257(1)(h), the deposit shall be forfeited and applied as per s. 267A. Section 257(1)(h) reads as:

(h) specify that where the balance of the purchase price is not settled on a date specified under paragraph (g), the sum paid as deposit under paragraph (f) to the chargee **shall be forfeited and disposed of in the manner specified under s. 267A**.

(emphasis added)

[9] Section 267A of the National Land Code reads as follows:

Section 267A

Where the purchaser **fails to settle the balance of the purchase price within the period specified in the order for sale** under section 257 or 263, the **deposit shall be forfeited and shall be applied by the chargee** as follows:

(a) firstly, in the payment of all moneys due specified in paragraphs 268(1)(a) and (b); and

A (b) secondly, in the payment of the balance if any, retained in the account of the chargor for the purpose of reducing the amount due to the chargee in the order of priority specified in paragraphs 268(1)(c), (d) and (e).

(emphasis added)

B **Bidder's Inability To Pay Within 120 Days**

[10] The bidder was not able to pay the balance of the purchase price by 3 August 2021. According to the bidder, they could not pay the balance of the purchase price because of the disruption caused by the MCO imposed by the Government of Malaysia as a result of the COVID-19 pandemic. In C summary, the bidder claimed that they could not make payment in time because of the following:

(i) the implementation of the MCO by the Government of Malaysia under s. 11 of the Prevention and Control of Infectious Diseases Act 1988 which commenced on 1 June 2021 and continued with the Restriction D Movement Control Order (RMCO) commencing from 3 July 2021 ("the said control orders").

(ii) due to the said control orders, the banking sector had shortened its operating hours to 2pm. With only 60% of its employees allowed to be E present physically at the bank premises, which had caused the delay in approving the loan facility and the issuance of the letter of offer to the bidder.

(iii) due to the said control orders, the law firms were not allowed to operate and subsequently, were only allowed to operate on 27 June 2021 with F the condition that the legal firm must first obtain permission from the Ministry of International Trade and Industry ("MITI"). The closure for 27 days resulted in a delay in the process of completing the loan documentation between the bidder and its financier.

(iv) closure of Public Islamic Bank Kuala Terengganu branch premises for G ten days due to COVID-19 infection resulted in the delay in execution of loan documentation and Form 19B by the bidder's financier thus causing a delay in presenting the private caveat documentation on behalf of the financier at the Pentadbir Tanah dan Galian ("PTG") Selangor.

(v) the PTG Selangor was also closed and was only allowed to operate again H on 21 July 2021 with only 20% of its employees allowed to be present physically at the PTG Selangor office, which caused the delay in the presentation of the private caveat by the bidder's solicitors.

[11] The chargor vehemently disputes the reasons put forward by the I bidder. The chargor maintains that in law, there can be no extension of time. In any event, the chargor maintains that the bidder's purported inability to make the requisite payment was their own doing or was self-induced.

Essentially, the chargor alleged that the bidder had various windows of opportunity to settle the balance of the purchase price and in any event, had not acted swiftly in seeking financing to complete the judicial sale and that they could have taken steps to avoid the impediments caused by the MCO. For reasons which will become apparent from a reading of the latter parts of this judgment, we do not think it is necessary to undertake any examination of the bidder's purported reasons for the said delay. But we will say this. From the chronology of events, it is clear that there were indeed windows or gaps of opportunity for the bidder to do the needful to settle the balance of the purchase price. In this regard, it is important to highlight that the judicial sale *via* the order for sale and public auction thereafter is not dependent on a bidder's ability to obtain financing from financial institutions. Indeed, the sources of funds are irrelevant. What is important and imperative is that the balance of the purchase price "must" be paid "not later than 120 days from the date of the sale" (per s. 257(1)(g) of the National Land Code) – in this case by 3 August 2021. Thus, the proverbial "clock" started ticking from the date of execution of the memorandum of sale.

[12] Thus, in a judicial sale, the successful bidder takes a financial risk in that, if for whatever reason, the balance of the price is not paid within 120 days from the date of the judicial sale, then the sale will be cancelled and the 10% deposit will be forfeited (per s. 257(1)(h) of the National Land Code) and applied for the benefit of the chargor's account (per s. 267A of the National Land Code). Indeed, case laws have gone so far as to state that a bidder's failure to pay within the period of 120 days will cause the sale to lapse and be rendered null and void. (See: the Court of Appeal's decision in *Santhi Krishnan* referred to in para. [37] of this judgment).

Bidder's Application To Intervene/Extension Of Time

[13] In the present case, the last date for payment was 3 August 2021. However, it was only after the expiry of the deadline that the bidder filed a notice of application on 6 August 2021 (encl. 73) to seek the High Court's leave to intervene in the execution proceedings and for an extension of time to complete the sale. Enclosure 73 was predicated on O. 15 r. 6 Rules of Court (leave to intervene) and O. 92 r. 4 of the Rules of Court ("inherent powers"). The bidder prayed for the following orders:

> (a) Satu Perintah bahawa pihak Bidder Sdn. Bhd. (No. Syarikat: 200701019479 (777491-T)) iaitu Pencelah yang Dicadangkan diberi **kebenaran mencelah** dalam tindakan di sini. Pencelah dibenarkan untuk **lanjutan masa bagi bayaran baki harga jual beli bertarikh 3.8.2021 untuk tempoh empat belas (14) hari dari 3.8.2021**; dan
>
> (b) Satu Perintah bahawa **tempoh bayaran baki harga jual beli bertarikh 3.8.2021 dilanjutkan untuk tempoh empat belas (14) hari dari 3.8.2021.**
>
> (emphasis added)

[14] Essentially, the bidder sought the leave of the High Court to intervene and for an extension of time of 14 days from 3 August 2021 to pay the balance of the purchase price.

[15] Obviously, it was in the bank's commercial interest for the judicial sale to be completed as otherwise, they would have to forfeit the deposit (per condition 16 and s. 257(1)(h) of the National Land Code) and then start all over again to conduct a judicial sale. Hence, it came as no surprise that in the instant case, the bank did not object to the bidder's said application for the court to grant an extension of time for payment of the balance of the purchase price. The bank took the position that it is a judicial sale conducted pursuant to the court's order under the National Land Code, which falls within the court's sole discretion and exclusive jurisdiction. Therefore, whether an extension ought to be granted, is solely within the court's judicial discretion.

Deputy Registrar's Decision

[16] On 24 August 2021, the learned Deputy Registrar ("DR") made the following orders:

> **Notis Permohonan Pencelah yang Dicadangkan dibatalkan;** dan
>
> Tempoh akhir pembayaran baki belian adalah pada 1 September, 2021 iaitu setelah **dikecualikan** tempoh sebanyak 28 hari mulai 1 Jun, 2021 sehingga 28 Jun, 2021 iaitu sepanjang tempoh Total Lockdown 3.0 daripada tempoh masa kiraan 120 hari selaras dengan Seksyen 257(1)(g) Kanun Tanah Negara 1965.
>
> (emphasis added)

[17] Essentially, the DR excluded (dikecualikan) 28 days (from 1 June to 28 June 2021) from the computation of 120 days and thereby indirectly "extended time" for payment of the balance of the purchase price. What happened next is that on 26 August 2021, the bidder's financier (the bank's Kuala Terengganu branch) disbursed the balance purchase price to the bank and subsequently, the bidder, having complied with all the terms of the proclamation of sale, the court proceeded to issue the certificate of sale (Form 16F) and the transfer of the subject property was then completed.

[18] It is of course critical to note that on 24 August 2021, the DR had actually struck out or dismissed the bidder's application to intervene. Yet, the DR granted the "exemption order". In any event, the DR's grounds for his decision to grant an "exemption" of 28 days are as follows;

> Bagi isu pertama sama ada Mahkamah adalah koram yang betul untuk mendengar permohonan ini. Mahkamah mengambil maklum bahawa tindakan pelaksanaan bagi menjual hartanah secara lelongan awam adalah bersandarkan kepada Perintah Jualan yang diberikan oleh

Mahkamah dalam Saman Pemula BA-24MFC-473-12/2017 yang mana perintah tersebut bersifat muktamad kera tiada pihak-pihak merayu terhadap perintah tersebut.

Justeru, perintah-perintah berkaitan arahan jualan yang diberikan dalam permohonan pelaksanaan mestilah selaras dan selari dengan dengan Perintah Jualan. Walaubagaimanapun, dalam penguatkuasaan Perintah Jualan tersebut, Mahkamah masih diberikan kuasa untuk memberikan arahan jualan selaras seksyen 257(1)(a)-(h) dan seksyen 257(2) Kanun Tanah Negara dan Aturan 31 KKM 2012.

Mahkamah bertanggunggjawab untuk memastikan bayaran baki harga jual beli dibayar dalam tempoh 120 hari selaras seksyen 259(3A)(a) KTN. Oleh itu, isu utama dalam permohonan lampiran 73 adalah mengenai tempoh pembayaran baki harga belian di dalam tempoh 120 hari sebelum Borang 16F dapat dikeluarkan. Sekiranya tempoh bayaran telah melebihi 120 hari, maka Borang 16F tidak boleh dikeluarkan dan lelongan tersebut akan dianggap gagal.

Oleh itu, Mahkamah berpandangan bahawa Mahkamah ini adalah koram yang betul untuk mendengar permohonan ini.

Bagi isu kedua, tempoh pembayaran 120 hari tersebut bukanlah dinyatakan di dalam KKM, namun ianya dinyatakan dalam seksyen 257 KTN. Oleh itu, Mahkamah tiada kuasa dan budibicara untuk melanjutkan tempoh penyelesaian baki harga jualan. Sekiranya gagal dijelaskan, maka peruntukan di dalam seksyen 257(1)(h) dan seksyen 267A adalah terpakai.

Bagi isu ketiga, *walapun Mahkamah berpandangan bahawa walaupun Mahkamah ini tiada kuasa dan budibicara untuk melanjutkan tempoh bayaran melebihi 120 hari, dengan mengambil kira bahawa sepanjang tempoh kawalan pergerakan pejabat Tanah di Selangor tidak beroperasi, Mahkamah mempunyai budibicara untuk tidak mengambilkira tempoh mulai 1 Jun 2021 sehingga 28 Jun 2021 iaitu selama 28 hari firma dan agensi kerajaan khususnya tidak beroperasi dan mengecualikan tempoh 28 hari sepanjang pelaksanaan Total Lockdown 3.0 daripada tempoh kiraan 120 hari sepertimana dinyatakan di dalam seksyen 257 KTN.*

Mahkamah juga berpandangan bahawa Aturan 3 Kaedah 5 juga Aturan 92 Kaedah 4 KKM 2012 hanya terpakai untuk tempoh masa yang ditetapkan dalam KKM sahaja dan ianya tidak terpakai bagi maksud permohonan lanjutan masa yang dipohon oleh pencelah di lampiran 73.

Oleh itu, Mahkamah memerintahkan:

Notis Permohonan lampiran 73 dibatalkan;

Tempoh akhir pembayaran baki belian adalah pada 1 September 2021 iaitu setelah dikecualikan tempoh sebanyak 28 hari mulai 1 Jun 2021 sehingga 28 Jun 2021, iaitu sepanjang tempoh Total Lockdown 3.0, daripada tempoh masa kiraan 120 hari selaras seksyen 257(1)(g) KTN;

Pencelah yang dicadangkan membayar kos sebanyak RM1,500 kepada plaintif dan RM1,500 kepada defendan.

(emphasis added)

[19] It is significant to note that the DR ordered the bidder to pay costs of RM1,500 each to the chargor and the bank. This underscores the reality that the bidder was, for all intents and purposes, unsuccessful in their application which was struck out ("dibatalkan").

[20] It is also pertinent to note that the DR concluded (rightly in our view) that the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 (Act 829) ("COVID Act") was not applicable to proceedings under the National Land Code including in particular, to the provision relating to the enforcement of a charge. It is relevant to note that during the passage of the relevant Bill in Parliament, the issue of hardship to bidders and their inability to comply with the strict time-line to make payments *etc*, were all raised and debated and it was a conscious decision of Parliament not to include the National Land Code as one of the statutes to be covered by the COVID Act such that it allows for suspension of time during the relevant period of the MCO and thereby alleviating the difficulties faced by successful bidders.

[21] The DR was fully aware that he had no power/discretion to extend time and if the bidder failed to pay as per s. 257(1)(g), then s. 257(1)(h) and s. 267A of the National Land Code would be applicable. The relevant passage from the DR's decision is reproduced for easy reference:

> Mahkamah **tiada kuasa dan budibicara untuk melanjutkan tempoh penyelesaian baki harga jualan. Sekiranya gagal** dijelaskan, maka peruntukan di dalam **seksyen 257(1)(h) dan seksyen 267A adalah terpakai**.
>
> (emphasis added)

[22] However, the DR opined that despite the lack of power or discretion to extend time, the court still retained a "discretion" to exclude the MCO period from 1 June to 28 June 2021 from the compensation of time. This is what the DR said in his grounds;

> Bagi isu ketiga, walapun Mahkamah berpandangan bahawa *walaupun Mahkamah ini tiada kuasa dan budibicara untuk melanjutkan tempoh bayaran melebihi 120 hari*, dengan mengambil kira bahawa sepanjang tempoh kawalan pergerakan pejabat Tanah di Selangor tidak beroperasi, *Mahkamah mempunyai budibicara untuk tidak mengambilkira tempoh mulai 1 Jun 2021 sehingga 28 Jun 2021 iaitu selama 28 hari firma dan agensi kerajaan khususnya tidak beroperasi dan mengecualikan tempoh 28 hari* sepanjang pelaksanaan Total Lockdown 3.0 daripada tempoh kiraan 120 hari sepertimana dinyatakan di dalam seksyen 257 KTN.
>
> (emphasis added)

Chargor's Appeal To The Judge In Chambers

[23] We turn now to the chargor's appeal to the judge in chambers and the decision of the learned Judicial Commissioner to dismiss the chargor's appeal.

[24] The chargor was dissatisfied with the said order by the DR, and filed an appeal by way of notice of appeal to the judge in chambers on 2 September 2021 (encl. 93) ("the said appeal"). On 9 September 2022, the learned Judicial Commissioner dismissed the said appeal. The learned Judicial Commissioner was of the view that the DR had considered the law, the facts of the case, issues and had taken into account the unprecedented circumstances due to the COVID-19 pandemic that had forced the country into a lockdown.

[25] The learned Judicial Commissioner concluded that in order to do justice and considering the unforeseen circumstances related to public health caused by the MCO, the DR had rightly invoked the court's inherent powers to allow suspension of time during the total lockdown period announced by the Government and therefore, the 28 days during the total lockdown from 1 June 2021 till 28 June 2021 was excluded in the computation of the 120 days stated in s. 257(1)(g) of the National Land Code.

[26] The learned Judicial Commissioner was of the view, that the bidder, being the successful bidder and a *bona fide* purchaser of the subject property and having paid the full balance price of the auction, has the *locus* to participate as a party to defend its rights in this proceeding. The learned Judicial Commissioner was cognisant that paras. (g) and (h) in sub-s. 257(1) are new provisions which came into effect on 1 December 2001 with the National Land Code (Amendment) Act 2001 (A1104).

[27] The requirement to pay the balance purchase price within 120 days from the date of the sale is mandatory as the word "shall" that appears in s. 257(1)(g) of the NLC is "directory". The learned Judicial Commissioner agreed with and endorsed the DR's decision that the court does not have the power to grant the extension of time to the purchaser to pay the balance purchase price under s. 257(1)(g) of the National Land Code.

[28] On the issue of whether the court has the inherent powers to allow suspension of time during the total lockdown period announced by the Government, the learned Judicial Commissioner was of the considered view that the court can take judicial notice of matters, events and public announcements by the Government in relation to the COVID-19 pandemic and the total lockdown that took place which is an issue raised in this case.

[29] Thus, the learned Judicial Commissioner opined that matters, events and public announcements by the Government relating to the pandemic and the implementation of the MCO are facts which are of general and common knowledge, facts which exist and it is accepted by the public. The High Court went on to observe that the COVID-19 pandemic had undeniably affected all forms of business and financial transactions.

[30] The learned Judicial Commissioner noted that matters relating to National Land Code were not within the scope of the COVID Act. As a result, s. 257(1)(g) was not covered by the COVID Act. However, the learned

Judicial Commissioner took note of the fact that the intention and inspiration during the presentation of the COVID Act in Parliament were clearly to help reduce the effects and impact in particular matters involving obligations and rights of the people and the affected parties.

[31] The learned Judicial Commissioner was of the view that there was sufficient evidence to prove that the bidder had taken the necessary steps to comply with the requirements and conditions under the order for sale and the auction, and that due to the total lockdown announced by the Government, the bidder could not meet the 120 days deadline.

[32] The learned Judicial Commissioner opined that the evidence shows that the conduct of the bidder was not such that they were trying to gain an advantage. The learned Judicial Commissioner was convinced that the bidder was purely precluded under conditions that are unprecedented and which are beyond their control. The learned Judicial Commissioner concluded that the bidder was not a *mala fide* purchaser. In reaching that conclusion the learned Judicial Commissioner considered the following:

(i) the bidder had duly complied with all the terms and conditions of the proclamation of sale. The bidder had caused the balance purchase price of the property to be fully paid to the bank and therefore, completed the sale intended therefrom upon extraction of Form 16Q by the court. Consequently, the bidder had extracted the sealed copy of the certificate for sale in Form 16F and the property had been duly transferred. Therefore, the bidder now has an indefeasible title;

(ii) the learned Judicial Commissioner opined that justice is one of the main principles of equity which has been adopted in dealing with matters pertaining to the National Land Code and as such, in this circumstance, though the High Court was not conferred with the powers to extend the time stipulated in s. 257(1)(g) of the National Land Code, but, due to the unforeseen and unprecedented events that took place which was caused by the COVID-19 pandemic which resulted in the total lockdown, the justice, in this case, required the High Court to invoke its inherent powers to prevent injustice or abuse to the bidder who was a *bona fide* purchaser.

(iii) the High Court is vested with inherent powers to be exercised towards the ends of justice or to prevent the abuse of the court process. Thus, based on the said unprecedented events and circumstances, in this case, to avoid injustice, it required the High Court to intervene and to exercise its discretion under its inherent powers, to allow suspension of time during the total lockdown period announced by the Government and therefore the 28 days during the total lockdown from 1 June 2021 till 28 June 2021 was excluded in the computation of the 120 days stated in s. 257(1)(g) of the NLC;

(iv) the High Court also took cognisance of the fact that the application for the extension of time was served on the chargor, who had filed his affidavit in reply (encl. 80) but had failed to file his submission on the date directed by the court. The court had heard all parties. The decision made was not an arbitrary decision. There was no high-handedness, there was no impropriety, and the decision made was transparent. The court has ensured that the interest of the chargor was safeguarded;

(v) further, in this case, since the chargor had not applied to a stay of execution of the DR's decision and the bidder had paid the full balance purchase price and the property had since been transferred to the bidder who is a *bona fide* purchaser, the holder of the indefeasible title, hence, the chargor can now only challenge the said title under s. 340(2) of the National Land Code under a fresh action; and

(vi) therefore, the DR's decision was based on cogent consideration that has taken into account the unprecedented circumstances and the facts of the case that necessitate the court to exercise its discretion under its inherent powers to dispense justice and fairness with the "just and equitable" principle.

Our Decision

[33] The main issue for determination in this appeal is whether the High Court has any "inherent powers" to extend time to enable a successful bidder to pay off the balance of the purchase price after the expiry of the 120-days time period as per s. 257(1)(g) of the National Land Code. On the facts here, the question is whether the DR and the learned Judicial Commissioner were correct in law in allowing a "suspension" of time during the total lockdown period announced by the Government and for the 28 days during the total lockdown from 1 June 2021 till 28 June 2021 to be excluded in the computation of the 120 days stated in s. 257(1)(g) of the National Land Code? The other issue is whether, after dismissing (or striking out) an application by an intervener, the court thereafter, has any power or jurisdiction to grant any orders, including but not limited to orders which are for the benefit of the proposed (unsuccessful) intervener.

The Substantive Issue

[34] We will start with the substantive issue. In this regard, we think that it is appropriate to start by referring to some case laws (with emphasis added) which have posited well-established principles pertaining to charge actions, judicial sale of charged property and the rights of a chargor to challenge such a sale.

[35] The first case is *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14; [1994] 1 MLJ 294; [1994] 1 AMR 4, where Edgar Joseph Jr FCJ (at p. 22 (CLJ); p. 309 MLJ (MLJ)) said:

A *The order for sale confers on the chargee, only the statutory rights to a judicial sale. A sale under ss. 256 or 260 of the NLC is a judicial sale ordered by court on the application of the chargee*. The chargor, who has until that stage not been divested of his proprietary rights *may intervene to set aside the sale in the event of* fraud, impropriety or *the breach of any statutory or contractual terms of the sale*. We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard.

As the court's power to order the sale including the authority to fix the price and condition of sale is derived from the statutory provision of the NLC after giving the chargor the right to be heard, it is manifest that any alteration to the term of condition must likewise be exercised.

(emphasis added)

[36] The next case is *AmBank (M) Bhd v. AIM Edition Sdn Bhd* [2022] 1 CLJ 831; [2022] 1 MLJ 357, where Mary Lim FCJ said:

D [47] When the chargee bank invokes its statutory right of sale, the chargee is only able to sell the **charged property in accordance with the terms of s. 257 (and the order made by the court)** ... .

(emphasis added)

E **[37]** We also refer to *Santhi Krishnan v. Malaysia Building Society Bhd* [2015] 1 CLJ 1099, where the Court of Appeal had to deal with an allegation that there was no evidence that the bidder had paid the balance of the purchase price within the period of 120 days. In that case, the Register had issued the certificate of sale, which confirmed the completion of the sale, *albeit* that the chargor had alleged that there was no evidence that the bidder had paid the balance of the purchase price within the period of 120 days. In that case, Justice Idrus Harun JCA (later FCJ) said:

[9] Under s. 257 of the National Land Code, every order for sale made by the court under s. 256 thereof is required to be made in Form 16H. One of the terms which must be specified in the order for sale is that the *balance of the purchase price shall be settled on a date not later than 120 days from the date of the sale and that no extension of the period so specified is allowed*. Once such order has been made, the chargee is required to prepare the conditions of sale in accordance with the terms of the said order and any determination thereunder by the Registrar of the court. This is provided in s. 258(2) of the National Land Code.

[10] The order for sale granted by the court on 21 November 2011 contains the term in question and the same has been incorporated into the conditions of sale in para. 14. The conditions of sale in this regard, also provides in para. 12 that a memorandum of sale must be signed by the successful bidder, the plaintiff or his solicitor and a court official who witnessed the auction on the same day the sale was made.

[11] It is settled law that in a forced sale pursuant to s. 256 of the National Land Code, the chargee at whose instance the sale is effected is to be regarded as the vendor. *The order for sale and the conditions of sale are to be regarded as the sale and purchase agreement* (see *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1989] CLJU 115; [1989] 1 LNS 115; [1990] 1 MLJ 317 and *Mohamed Azmal Noor Naina Mohd Noor v. Arab-Malaysian Finance Bhd & Anor* [2003] 2 CLJ 505; [2003] 4 MLJ 447).

[12] Having stated the law, there is not the slightest room for doubt that, in the case before us, the orders for sale, the conditions of sale and the memorandum of sale constitute a sale and purchase agreement. That being the case, *in the event of any breach of the terms of the conditions of sale, the contract secured under the public auction would lapse and become null and void*. In the case of *Wong Sze Soon v. Pegawai Pemegang Harta Malaysia & Anor* [1995] 4 CLJ 416; [1995] 3 MLJ 57, the plaintiff who was the successful bidder at a public auction pursuant to foreclosure proceedings, *failed to pay the full balance of the purchase price within the time stipulated in the terms and conditions of the sale*. The High Court held that *without such payment, the contract secured by the plaintiff under the public auction lapsed and thus became null and void* (see also *Rajamanikam Adaikalam v. Bolton Finance Bhd* [1999] 8 CLJ 491 and *Norazian Mohd Adnan v. Gale Force Sdn Bhd* [2009] CLJU 1365; [2009] 1 LNS 1365; [2009] 6 MLRH 830).

[13] *In the instant case, the appellant had alleged that the successful bidder did not pay the balance of the purchase price in respect of which he was obliged to do so within the stipulated period of 120 days* and the respondent merely denied the said allegation. No evidence had been proffered by the respondent in its affidavit that the successful bidder had actually paid the full balance of the purchase price of the property. In the absence of any evidence to show that the successful bidder had paid the balance of the purchase price when due, we must accordingly hold that *the successful bidder had failed to do so within the stipulated period stated in para. 14 of the conditions of sale. The successful bidder had thus committed a breach of the agreement for the sale and purchase of the property. Under the circumstances the contract which the successful bidder had secured in respect of the sale of the property had lapsed and therefore become null and void*.

(emphasis added)

[38] Having set out the relevant principles pertaining to a bidder's obligation to strictly comply with the 120-day time period to pay the balance of the purchase price, the question is whether any extension of time is legally possible. Hence, we now turn to consider s. 257(1)(g) of the National Land Code. In our view, it is clear from a plain reading of s. 257(1)(g) and (h) of the National Land Code that "the balance of the purchase price shall be settled on a date not later than 120 days from the date of the sale and that there shall be no extension of the period so specified" and "where the balance of the purchase price is not settled on a date specified under para. (g), the sum paid as deposit to the (bank) shall be forfeited and disposed of in the manner specified under s. 267A".

[39] The obvious question is – does the court (regardless of how compelling the circumstances are) have the power to "extend" time to enable the successful bidder to pay on a date after the expiry of 120 days? Both the DR and the learned Judicial Commissioner concluded that the court did not have the power to extend time. We agree with their conclusions.

[40] In this regard, it is necessary to emphasise that the words appearing in s. 257(1)(g) of the National Land Code are clear and unambiguous both as to its intent and effect and as to whether there can be any extension of time. It says in plain language that "there shall be no extension of time of the period so specified".

[41] On the issue of statutory interpretation, we are guided by the decision of the Federal Court in *AJS v. JMH & Another Appeal* [2022] 1 CLJ 331; [2022]1 MLJ 778, where the Hon Chief Justice, Tengku Maimun Tuan Mat (speaking for the majority) said at para. [44], "... in construing a statute effect must be given to the object and intent of the legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute ...".

[42] In the case before us, it has not even suggested here that there is any ambiguity in the wording of s. 257(1)(g) of the National Land Code. On the contrary, it seems quite obvious that parties are on common ground that the said section does not permit any extension of time. Hence, although the DR and the Judicial Commissioner agreed that there was no power to extend time, they nevertheless resorted the court's "inherent powers".

[43] In *Toh Hi Taa & Anor v. Citibank Bhd* [2005] CLJU 394; [2005] 1 LNS 394; [2005] MLJU 681, Justice Abdul Malik Ishak had referred to s. 257(1)(g) of the National Land Code and said (rightly in our view) that the High Court had no power to extend time. This is how the learned judge put it:

> *It is crystal clear that* s. 257(1)(g) of the NLC *stipulates two things* that must be complied with. Firstly, that the balance of the purchase price in the sum of RM54,000.00 shall be settled not later than 120 days from the date of sale which was on 25.10.2004 and so the last date would be on 25.2.2005. *Secondly, there shall be no extension of the period so specified.*
>
> From the facts, the balance of the purchase price of that terrace house amounting to RM54,000.00 has not been paid. This meant that the deadline has ended. It was compounded by the fact that the first applicant was and is only a permanent resident and he was thus barred from purchasing that terrace house. The application in enclosure one (1) that sought for an additional 120 days cannot be acceded to by this court. It

runs foul of s. 257(1)(g) of the NLC and this court has no jurisdiction to extend time in favour of the applicants. The word "*shall*" that appears in s. 257(1)(g) of the NLC is clearly "*directory*" or "*mandatory*". It must be complied with to the letter. In other words, it is an imperative provision and it allows no discretion at all. Coleridge C.J. in *Woodward v. Sarsons* [1875] L.R. 10 C.P. 733 at 746 aptly said:

> An absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

It must be borne in mind that the NLC is a codified land law of the country. It incorporates the Torrens system and it brings about certainty in land dealings in the country. A uniform code of land law was introduced through the NLC that came into force on January 1, 1966. On interpretation of statute, Lord Campbell L.C. in *Liverpool Borough bank v. Turner* [1861] 30 L.J. Ch. 379 *at page 380 aptly said*:

> No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the courts of justice to try and get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.

The "real intention of the legislature" in enacting the NLC was to establish a "uniform clear-cut system of land tenure and dealing" and "to adapt the system to the social and economic changes of half a century or more": (see Abdul Rahman bin Ya'kub: at page 158, "Proceedings of the Dewan Negara" (Federal Parliament) August 9, 1965).

I must give effect to the NLC especially to the mandatory provisions of s. 257(1)(g) thereto. In *Siland Sdn Bhd & Anor v. M & J Frozen Food Sdn Bhd & Anor* [1990] 2 MLJ 502, Richard Talalla J.C. (as he then was) held, *inter alia*, that *there was no provision to extend time for payment of the balance of the purchase price and neither has the court the jurisdiction to do so*. The Supreme Court confirmed the decision of the learned Judicial Commissioner and this can be seen in the case of *M & J Frozen Food Sdn. Bhd & Anor v. Siland Sdn. Bhd. & Anor.* [1994] 2 CLJ 14.

(emphasis added)

[44] In the case of *Santhi Krishnan* (*supra*), it seems quite clear that the Court of Appeal had opined at para. [9] of the judgment that pursuant to s. 257(1)(g) of the National Land Code, "no extension of the period so specified is allowed".

[45] In the present case, it is quite obvious from a reading of the grounds of decision by the DR and the grounds of judgment by the Judicial Commissioner that they were impelled by the compelling circumstances (caused by the COVID pandemic) to assist and alleviate the bidder from the harsh consequences of the MCO *etc*, and in that regard relied on "inherent powers" of the court to grant an exemption.

[46] The inherent powers of the court are encapsulated in O. 92 r. 4 of the Rules of Court 2012. It reads as follows:

> For the removal of doubts, it is hereby declared that **nothing in these rules** shall be deemed to limit or affect the **inherent powers of the court** to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.
>
> (emphasis added)

[47] In allowing the exemption of 28 days, the DR relied on the decision of the High Court in *Ho Kean Pin v. Malayan Banking Bhd & Anor* [2020] CLJU 1107; [2020] 1 LNS 1107; [2020] MLJU 1435, where the High Court had indicated that it was prepared to extend time to pay because the plaintiff (bidder) was a genuine purchaser and had obtained financing but had faced difficulties in complying with 120-day time period because of the MCO *etc.* The decision of the High Court in *Ho Kean Pin* may be gathered from the following paragraphs:

> [32] It is indeed unfortunate that the plaintiff is placed in this dire predicament due to no fault of the plaintiff but for the imposition of the MCO. However, unlike some other countries where new laws were passed to deal with issues of this nature, at the time of writing this judgment, in Malaysia new legislative provisions have yet to be enacted by Parliament to deal with a situation as in this application which is caused solely by the restrictions of the MCO.
>
> [33] Thus, without the necessary legislative provisions, this court cannot grant any orders that would be in breach of the clear mandatory provisions of s. 257(1)(g) of the NLC.
>
> [34] Nevertheless, based on the averments in the affidavit in support, the plaintiff appears to be a serious and *bona fide* bidder and has obtained a loan from a financial institution and is able to complete the sale. However, due to the enforcement of the MCO, since the operations of the relevant agencies and departments had been affected, the sale could not be completed for reasons explained earlier.
>
> [35] Therefore, on the face of the application in enclosure 1, this appears to be a fit and proper case for this court in the interest of justice, to invoke its inherent jurisdiction to allow this application by adopting the approach taken in *Hee Nyuk Fook* (*supra*) and *Sundarajan a/l Sokalingam* (*supra*) in interpreting s. 257(1)(g) of the NLC.
>
> [36] Yet, bearing in mind the intention of Parliament in enacting s. 257(1)(g) of the NLC and the principles laid down in *M & J Frozen Food Sdn Bhd* (*supra*), this court must also ensure that the chargors' interest is not jeopardised when deciding whether to allow the plaintiffs application in enclosure 1. Hence, it is requisite that the chargors be afforded a chance to be heard before the determination of enclosure 1.

[37] To enable the chargors/2nd defendants to avail the opportunity to address this court, the cause papers must be served on them. In this instance, the plaintiff's counsel had informed the learned Senior Assistant Registrar during case management on 08/05/2020 that the cause papers will be served on the 2nd defendants by A.R. Registered post and on 05/06/2020 informed that the cause papers have been duly served. However, when enclosure 1 was called up for hearing on 10/6/2020, no affidavit of service was filed to verify the plaintiff's counsel's assertions made to learned Senior Assistant Registrar during the case managements.

[38] The plaintiff must file an affidavit of service to prove the service of the cause papers on the 2nd defendants. As the 2nd defendants were not present during the hearing, and in the absence of an affidavit of service, I am unable to ascertain that the cause papers have indeed been served on the 2nd defendants as chargors. Consequently, I am unable to determine that the 2nd defendants have not been deprived of their right to be heard and will not be prejudiced if this application is allowed.

[39] Additionally, though it was indicated in the written submission filed by the plaintiff's counsel that the plaintiff is prepared to pay interest if the extension of time is granted, it was ambiguous as to how much interest the plaintiff is prepared to pay especially since the application and the supporting affidavit thereto in enclosure 1 is silent about the payment of interest.

[40] In order to protect the chargors' interest, clear and unequivocal provisions for the payment of interest during the period of the extension sought should be included in the application in enclosure 1, which was not the case here.

[41] Furthermore, the plaintiff also did not indicate the compliance and/or agreement to the condition stipulated by the 1st Defendant as stated in paragraph 20 above.

[42] So, even though the plaintiff will be prejudiced if an extension of time is not granted, the inherent jurisdiction of this court cannot be invoked solely in favour of the plaintiff especially since there is the issue that the interest of both the 1st and 2nd defendants may not be protected and may be jeopardised.

Conclusion

[43] For these reasons, enclosure 1 is dismissed with no order as to cost.

[48] In our view, *Ho Kean Pin* is hardly an authority for the proposition that the court can exercise its inherent jurisdiction to extend time. It is obvious that the chargee bank had merely highlighted to the court that pursuant to the mandatory stipulation in s. 257(1)(g) of the NLC, there shall be no extension of time for the period of 120 days specified for the payment of the balance purchase price.

[49] Beyond that, the chargee bank had "left it to the discretion of the court whether or not to grant the extension sought by the plaintiff, subject to the proviso, that if an extension is granted, the same must be conditional ...". The condition imposed by the chargee bank was that the bidder must obtain the consent of the chargor. Now, it is interesting to note that the chargors were not in attendance during the hearing and the High Court was not satisfied that the papers had been served on the chargors.

[50] Hence, whilst the High Court had indicated that it would have exercised its inherent jurisdiction to extend time, it nevertheless dismissed the application by the bidder. These points appear to have been missed by the DR. In any event, we are of the view that the passage in that judgment of the High Court indicating that it was a fit and proper case for the court in the interest of justice, to invoke its inherent jurisdiction to grant an extension of time, was wrongly decided.

[51] Indeed, if the papers been served on the chargors, it is likely that they would have vehemently objected and the learned Judicial Commissioner in *Ho Kean Pin* might have been better apprised of the relevant case laws touching upon the subject and in particular cases such as *Malaysia Building Society Bhd v. Merit Aim Sdn Bhd & Anor; Cameron Mall Sdn Bhd & Anor (Interveners)* [2012] 4 CLJ 269 per Lee Swee Seng JC (now JCA) where His Lordship said, "[38] The protection here under the National Land Code is such that *there is a strict timeframe of not later than 120 days from the date of the auction sale for the balance purchase price to be paid and there shall be no extension of time for the period so specified. (Section 257(1)(g) of the NLC).* In the event the bidder could not pay the balance purchase price on time, the deposit paid is forfeited to the account of the chargor and the land put up for re-auction again. Section 267A of the NLC provides: ..." and Justice Abdul Malik Ishak's judgment in *Toh Hi Taa & Anor v. Citibank Bhd* [2005] CLJU 394 [2005] 1 LNS 394; [2005] MLJU 681 where he had stated that the court had no power to extend the time to enable a bidder to pay after the 120-day period had expired.

[52] We now deal with the belated suggestion by the bidder/bank that the court had power to extend time under para. 8 of the Schedule to the Courts of Judicature Act 1964 pertaining to the Additional Powers of the High Court. Pursuant to para. 8, the High Court has "power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, although any application therefor be not made until after the expiration of the time prescribed: provided that this provision shall be without prejudice to any written law relating to limitation." Clearly, this was not taken up before the DR or the learned Judicial Commissioner. At any rate, the following cases touching upon the court's power to extend time were relied upon:

(i) *Datuk Bandar Kuala Lumpur v. Kuala Lumpur Golf And Country Club Bhd* [2005] 3 CLJ 901; and

(ii) *Perbadanan Pengurusan Anjung Hijau v. Pesuruhjaya Bangunan Dewan Bandaraya Kuala Lumpur* [2018] 7 CLJ 336.

[53] The case of *Datuk Bandar Kuala Lumpur v. Kuala Lumpur Golf And Country Club Bhd* [2005] 3 CLJ 901 ("*KLGCC* case"), was a rating appeal under s. 145 of the Local Government Act 1976 ("the Act"). Section 145 provides that "with the filing of the originating motion there shall be paid into the local authority the amount of the rate appealed against":

(i) the respondent, Kuala Lumpur Golf and Country Club Bhd (KLGCC) had, on 31 December 1996, filed an originating motion under s. 145 of the Act praying that: (i) the decision of the Datuk Bandar Kuala Lumpur (DBKL) made on 27 November 1996 whereby the total annual value of certain land was revised to a total sum of RM5,760,000 be set aside, and that the annual value be substituted by the estimated gross annual rent of the land amounting to RM1,300,000 only; and (ii) the costs of this appeal be taxed by the proper officer of this court and be paid by the respondent to the appellant;

(ii) as at the time of the filing of the originating motion, KLGCC had not paid the rate appealed against. The amount was only paid on 6 February 1997, *ie*, about five weeks later;

(iii) DBKL raised a preliminary objection that the appeal was not properly brought because KLGCC did not pay DBKL the amount of the rate appealed against "with the filing of the originating motion", as required by the proviso to s. 145(1) of the Act;

(iv) on 9 June 1997, KLGCC filed the originating motion praying that the time for the payment of the rate appealed against be extended to 6 February 1997, the day it was paid. The High Court allowed KLGCC's application;

(v) on 25 October 2004, the Federal Court granted an extension of time to appeal and leave to appeal for DBKL to appeal to the Federal Court on the following questions of law: (a) whether the time to pay the rates appealed against, which by the proviso to s. 145(1) of the Act, is stated to be at the time of filing the motion could, despite its mandatory nature, be extended by the court; and (b) whether the general power of the court to extend time under the Courts of Judicature Act 1964 ('the CJA') could apply to a particular statute which imposes express time stipulations, and which statute does not itself provide for extension of time.

[54] The judgment of Justice Abdul Hamid Mohd (FCJ-later CJ) (in summary) was that:

> [1] Whether or not the time for payment of the rate as provided by s. 145(1) of the Act could be extended depended on whether at the time of the filing of the originating motion, the amount had been made known to the respondent. If the amount had not been made known to the respondent, the condition requiring payment at that point of time was incapable of performance. Thus, the interest of justice required that the court might extend the time so as not to frustrate the right of appeal of the respondent. (p 913 c)
>
> [2] *Whether or not the general power of the court to extend time under para. 8 of the Schedule to the CJA is applicable to a statute that does not provide the power for the extension of time will depend on the provision of the statute. If from the wording of the statute, the time prescribed for the doing of an act is mandatory and the condition to be fulfilled exists during the period and is capable of performance, the general power to extend time under para. 8 of the Schedule to the CJA is not applicable*. But, as in this case, where the condition *ie*, the payment of the rate had not existed because the amount thereof was not yet known to the respondent and was therefore incapable of performance by the respondent, the interest of justice required that the general power to extend might be ordered by the court. (p 913 d-f)
>
> [3] In the circumstances of this case, the learned judge was right to make the order for the extension of time for the respondent to pay the rate so as not to frustrate the respondent's right of appeal through no fault of theirs.
>
> (emphasis added)

[55] For the bidder/bank, it was argued that the High Court's power to extend time as provided under para. 8 of the Schedule to the CJA was applicable on the facts of the present case in that although the time prescribed for the doing of an act is mandatory (per s. 257(1)(g) of the National Land Code) and the condition to be fulfilled (obligation to pay within 120 days) existed during the period, it however, was not capable of performance. The bidder's inability to fulfil the obligation to pay within 120 days was apparently due to MCO which brought about a disruption to legal services, limited banking hours and closure of the PTG's office.

[56] We do not agree that there was on the facts here, a situation where the bidder was incapable of performing its payment obligation within 120 days from 5 April 2021 – *ie*, by 3 August 2021. The bidder signed the memorandum of sale and knew that it had to pay within 120 days. Indeed, on the facts there were periods or windows of opportunity for it to make the payment. The fact that the bidder had to seek financing is, to put it bluntly – its own problem. It was up to the bidder to find its source of funding. The bidder knew that if it did not pay within 120 days, the 10% deposit would

be forfeited and the sale cancelled. That is exactly the consequence or outcome as clearly and unambiguously provided by s. 257(1)(g) and (h) of the National Land Code.

[57] The wording of s. 257(1)(g) is not just mandatory but it goes so far as to state unequivocally that there shall be no extension. In those circumstances, we do not see how the bidder can invoke para. 8 of the Schedule to the Courts of Judicature Act 1964 to justify the High Court's exemption (equivalent to extension) of 28 days.

[58] For these reasons, the bidder's and bank's reliance on the *KLGCC's* case (*supra*) is totally misplaced and we do not agree that the High Court had the requisite power to allow encl. 73 and grant an exemption (equivalent to extension) of 28 days in favour of the bidder.

[59] Next is the High Court's decision in *Perbadanan Pengurusan Anjung Hijau v. Pesuruhjaya Bangunan Dewan Bandaraya Kuala Lumpur* [2018] 7 CLJ 336 ("*Anjung Hijau*"), which the bidder and the bank rely upon for the proposition that even if a statutory provision is mandatory, the court may still be able to extend time under para. 8 of the Schedule of the Courts of Judicature Act 1964. However, the High Court's decision in *Anjung Hijau* was reversed by the Court of Appeal on 9 November 2017 in Civil Appeal No: W-02(NCVC)(A)-1221-07-2017 (*Pesuruhjaya Bangunan Dewan Bandaraya Kuala Lumpur lwn. Perbadanan Pengurusan Anjung Hijau*). As such, the High Court's decision may not be relied upon at all.

[60] Thus, it appears that in their endeavour to do justice in favour of the bidder, the High Court (DR and learned Judicial Commissioner) had acted contrary to the clear, unambiguous and imperative wording in s. 257(1)(g) of the National Land Code, which does not permit any extension of time.

[61] We are of the view that there was no inherent power or discretion or jurisdiction to grant any exemption whatsoever. Of course, if the COVID Act had applied then that would have alleviated the bidder's situation. Or alternatively, the National Land Code itself ought to have been appropriately amended to cater for the difficulties that may be faced by successful bidders at public auction as there could be a myriad of reasons why they may not be able to meet the 120-day deadline. But that is a matter for Parliament to take care of. It is not for the courts to make orders which are said to be done for the sake of justice and in that process to go against the clear wording of the relevant statute.

[62] In this regard, it is apposite to refer to the decision of the Singapore Court of Appeal in *PP v. Lam Leng Hung And Others* [2018] SGCA 7; [2018] 4 LRC 54 where Andrew Phang Boon Leong JCA administered a salutary reminder that courts should resist the temptation to augment a statutory provision in a manner that will give effect to contemporary models of justice. This is how he put it:

> ... where a governing statutory provision fails to evolve with the times and becomes unable to effectively regulate its appointed area of socio-economic activity, the impulse to augment the statutory provision in a manner that will give effect to contemporary models of justice – or simply to do what the court perceives to be justice in the particular case before it – may become urgent and overwhelming. In such cases the impulse strains against the borders of the judicial function. However, the **court cannot give way to this impulse and must remain guided by statutory language and legislative purpose in determining the result in the case before it**.
>
> (emphasis added)

[63] To sum up, whilst we acknowledge the harshness of s. 257 of the National Land Code, we feel compelled to state that there is no choice in the matter and the courts must not impulsively resort to "inherent power" to do what they think is the justice of the case and overcome the strictures or harshness of the said statutory provision. The duty of the court is to apply the law, no matter how harsh or unreasonable the consequences may be.

[64] In this regard, we endorse the words of Justice Abdul Malik Ishak in *Toh Hi Taa* (*supra*), where he said, "the word "shall" that appears in s. 257(1)(g) of the NLC is clearly "directory" or "mandatory". It must be complied with to the letter. In other words, it is an imperative provision and it allows no discretion at all". And following the decision of the Court of Appeal in *Santhi Krishnan* (*supra*), if a successful bidder fails to pay the balance of the purchase price in respect of which he was obliged to do so within the stipulated period of 120 days, then such a sale had lapsed and therefore became null and void. Here, the balance of the purchase price was not paid by 3 August 2021. Thus, the sale had lapsed and was null and void. The 10% deposit which was paid by the bidder should therefore be forfeited and applied as per s. 267A of the National Land Code.

Procedural Issue

[65] We now deal with the procedural issue – whether, after dismissing (or striking out) the bidder's application to intervene and to seek an extension of time, the court thereafter has any power or jurisdiction to grant any orders, including but not limited to orders which are for the benefit of the unsuccessful intervener (the bidder). In this regard, the decision of the DR was as follows:

> **Notis Permohonan Pencelah yang Dicadangkan dibatalkan;** dan
>
> Tempoh akhir pembayaran baki belian adalah pada 1 September, 2021 iaitu setelah **dikecualikan** tempoh sebanyak 28 hari mulai 1 Jun, 2021 sehingga 28 Jun, 2021 iaitu sepanjang tempoh Total Lockdown 3.0 daripada tempoh masa kiraan 120 hari selaras dengan Seksyen 257(1)(g) Kanun Tanah Negara 1965.

[66] In this regard, the learned Judicial Commissioner glossed over the fact that despite the bidder's application per encl. 73 being struck out/dismissed ("dibatalkan") and the bidder ordered to pay costs to the bank and the chargor, the DR had gone on to make an order in favour of the bidder and granting an exemption of 28-days (effectively an extension of 28 days) for the bidder to pay the balance of the purchase price. And added to that is the fact that the bidder did not file any notice of appeal to the judge in chambers. This means that the bidder, either expressly or implicitly or by conduct, accepted the decision of the DR to strike out/dismiss encl. 73. Procedurally, once encl. 73 is dismissed or struck out, then it is "spent" and there is nothing left before the DR to enable him to make any order whatsoever. Thus, once encl. 73 is struck out or dismissed, then that is the end of the matter. We are unable to fathom the legal or procedural basis for the orders that were made by the DR after striking out (or dismissing) encl. 73. Thus, quite apart from the substantive reasons as discussed above, we find that the DR's order dated 24 August 2021 is also fundamentally and procedurally defective and this defect is not capable of being cured under the Rules of Court 2012.

Outcome

[67] For the reasons as discussed above, we are satisfied that the learned Judicial Commissioner had erred and/or misdirected herself in holding that the court had inherent power to allow an exemption of 28 days and by that route, indirectly extending the time for payment of the balance of the purchase price which is not permitted by s. 257(1)(g) of the National Land Code. Further, as explained above, the order of the DR is also fundamentally and procedurally flawed.

[68] In the result, the chargor's appeal is allowed and the Judicial Commissioner's order dated 9 September 2022 dismissing encl. 93 is set aside. We grant order in terms of encl. 93 and the Deputy Registrar's order dated 24 August 2021 is likewise set aside.

Consequential Orders

[69] We hereby grant the following consequential orders:

(i) the judicial sale of the charged property to the bidder (second respondent) per the order for sale dated 20 February 2018 and memorandum of sale dated 5 April 2021, is set aside;

(ii) in accordance with s. 257(1)(g) and (h) and condition 16 of the memorandum of sale dated 5 April 2021, the 10% deposit in the sum of RM160,000 paid by the bidder (second respondent) is forfeited and is to be applied as per s. 267A of the National Land Code;

(iii) the differential sum of RM480,000 paid by the bidder to the bank is to be refunded to the bidder;

(iv) the registration of the title in the name of the bidder (second respondent) is set aside;

(v) the chargor (appellant) is forthwith reinstated and restored in the registered document of title as the registered owner of the subject property;

(vi) the charge per No. Perserahan No. 75746/2008 bertarikh 12 Ogos 2008 di atas tanah dipegang dibawah Geran No. Hak Milik 194223, Lot 109568, Mukim Klang, Daerah Klang, Negeri Selangor Darul Ehsan in favour of the bank (first respondent) is to be forthwith reinstated in the registered document of title;

(vii) the order for sale dated 20 February 2018 is valid and continues to remain in force and leave to execute the said order for sale is granted;

(viii) the subject property is to be re-sold *via* a judicial sale to be conducted pursuant to a new auction date and directions to be given by the High Court at Shah Alam;

(ix) parties are to appear before the Judicial Commissioner/judge or the Deputy Registrar (as applicable) at the High Court at Shah Alam on 23 August 2024 at 9am to obtain a date for the auction and for directions accordingly;

(x) parties at liberty to apply to the High Court at Shah Alam for all such directions or orders as may be necessary to give effect to the order of this court;

(xi) the Pendaftar Hak Milik Tanah/Pentadbir Tanah dan Galian (as the case may be) is hereby directed to take immediate action to give effect to the order of this court in the registered document of title.

Costs

[70] We order the respondents (bank and bidder) to pay costs to the appellant as follows:

(i) first respondent (bank) to pay RM10,000 costs to the appellant (chargor) (subject to allocator) (as costs here and below);

(ii) second respondent (bidder) to pay RM10,000 costs to the appellant (subject to allocator) (as costs here and below).